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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 269

HENRY A. GARDNER, TRUSTEE OF THE ALTON RAILROAD COMPANY,

Petitioner,

vs.

FLORENCE GRISWOLD, ADMINISTRATRIX OF THE ESTATE OF LOYAL S. GRISWOLD, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Henry A. Gardner, as Trustee of The Alton Railroad Company, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above case on May 15, 1946.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 15, 1946 (R. 170). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A., § 347 (a)).

Opinion Below.

The opinion of the majority of the Court, affirming the judgment of the District Court for the Northern District of Illinois, Eastern Division, was delivered by Circuit Judge Major (R. 160-166). This opinion was concurred in by Circuit Judge Kerner, with the exception of the statements therein to the effect that this Court has converted the Federal Employers Liability Act into a compensation law and has made a railroad an insurer of its employees (R. 166). District Judge Lindley dissented from the affirmance on the grounds that certain instructions were erroneously given (R. 166-169) on behalf of the Respondent. The opinion of the Circuit Court of Appeals is not yet reported.

STATEMENT OF THE CASE.

This was a death action under the Federal Employers Liability Act (45 U. S. C. A., § 51 *et seq.*), brought by the Administratrix of the Estate of Loyal S. Griswold, Deceased. The jury rendered a verdict for Respondent, upon which judgment was entered (R. 140). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was affirmed by a divided court (R. 170).

Respondent's decedent, a brakeman employed by the Petitioner, was killed about 3:40 A. M., January 25, 1943, in Petitioner's yard at Bloomington, Illinois. This yard consists, among others, of a series of 15 tracks, numbered from 1 to 15 from the west to east and running north to south. At the south end of the yard there is an underpass known as the Chestnut Street subway (R. 12). The entrance to the subway on the west side is 50 feet west of track 6. There were three street lights on the west side of the yard, the first 19 feet north of the subway entrance (R. 85).

At about the time Griswold was killed, the weather was fair and clear (R. 11, 29, 48). Griswold's train (No. 93) was standing on track 7, with the engine at the south end of the train opposite the Chestnut Street subway (R. 12). North of 93's engine, about 10 or 12 car lengths, on track 6, the next track to the west, was the south end of a string of cars (R. 36, 40). A short time before the accident, a switch engine that moved north on track 7 removed the caboose from the south end of that train (R. 58). The switch crew then got 17 cars from track 12, which was to the east of tracks 6 and 7, and pulled the strings of cars

onto the lead in a southwesterly direction past the front end of Train No. 93's engine, and then started pushing the cars in a northerly direction on track 6, which was to the west of Griswold's train (R. 41, 72).

Scharfenberg, a member of the switch crew, was stationed at the south end of the standing cars on track 6, at a point between track 6 and 7, waiting to receive the cars (R. 42, 43). It was light enough to enable him to see the first car in the string being shoved by the switch engine when that car entered track 6, which was a point some distance south of where 93's engine was standing (R. 43, 45). He could see also one of the members of his crew riding on the leading end on the east side (R. 46). The cars were moving at a normal switching speed of from 2 to 6 miles an hour and making the usual noise of railroad cars in motion (R. 19, 21, 34, 57). As the cars approached Scharfenberg, he gave a number of signals, known as distance signals, for the purpose of informing his engineer of the distance remaining between the standing and the moving cars (R. 49). When these cars reached the point on track 6, at the front end of 93's engine, switchman Craig of the switch crew dropped off the cars for the purpose of relaying Scharfenberg's signals to his engineer (R. 43, 46, 76).

While the foregoing moves were being made, the fireman of Train 93 was on the seat box on the left, or east side, of his engine, and the engineer was seated on the west side on the seat box looking back north along his train watching his conductor who, at that time, was some thirty car lengths north of the engine, between tracks 6 and 7 (R. 17).

When the cut of cars being pushed north on track 6 was about a car length, or some 50-odd feet, away, Griswold's engineer heard them coming (R. 19).

Shortly before this Griswold—who had been on the engine—got down on the west side.

Griswold's unlighted lantern was found on the west side of track No. 6 (between tracks 5 and 6), about opposite the tank of 93's engine, and his body was found across the west rail of track 6, some six or seven car lengths north of his engine (R. 47, 59). What Griswold was doing immediately before the accident no one knows. He had no duties to perform which would require him to be on track 6.

There was no proof of the violation of any rule, custom or practice in connection with any of the moves or operations being performed at the time. There was only one rule introduced in evidence (Petitioner's Ex. No. 1, R. 69), which provides as follows:

> "When cars are pushed by an engine, except when shifting or making up trains in yards, a white light must be displayed on the front of the leading car by night."

In substance, the negligence charged was that Petitioner shoved a string of cars onto track 6 without giving the decedent a signal or warning of the approach of said cars, either by a light on the leading end or a man riding thereon (R. 4).

In the Circuit Court of Appeals petitioner contended: That there was no evidence that petitioner was either guilty of negligence or that any negligence of his was a proximate cause of the accident. These contentions were presented upon the assumption that, where liability is based on negligence, it is the function of the reviewing court to determine whether there was sufficient evidence to sustain a jury's finding. The Court of Appeals refused to perform this function, laying down the rule that "not only are these issues to be decided by the jury, but its decision is unassailable." (R. 162.)

Petitioner also urged that the trial court erred in instructing the jury that it was Petitioner's duty to furnish Respondent's decedent with a reasonably safe place in which to work, since the Complaint did not charge a breach of such duty and there was no evidence to which the instructions could be applicable; that the rule requiring a master to furnish a reasonably safe place to work had reference only to the physical condition of the place itself; and that there was no evidence of any causal connection between the physical condition of the place and the accident. The majority of the court held the giving of these instructions was not error (R. 163-166) from which ruling Judge Lindley dissented (R. 166-169).

QUESTIONS PRESENTED.

1.

In actions under the Federal Employers' Liability Act is a finding of the jury that the railroad was guilty of negligence and that such negligence was a proximate cause of the accident conclusive and not subject to review.

2.

If a jury's finding of negligence and proximate cause is not conclusive, but is subject to review, was there sufficient evidence of negligence and causal connection in the instant case to support the jury's finding?

3.

Was it reversible error to instruct the jury to the effect that it was Petitioner's duty to furnish Respondent's decedent a reasonably safe place in which to work when the complaint did not charge a breach of such duty and there was no evidence either that the physical condition of Petitioner's yard was not reasonably safe or had any causal connection with the accident?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Majority of the Circuit Court of Appeals Has Decided an Important Question of Federal Law Contrary to the Applicable Decisions of This Court.

A.

The Majority of the Court of Appeals in Holding That in Actions Under the Federal Employers Liability Act, a Jury's Finding as to Negligence and Proximate Cause Is Conclusive and Is Not Subject to Review on Appeal, Has Rendered a Decision Contrary to the Law.

Circuit Judge Major prefaced the statement of the evidence in this case with the following remarks:

> "Any detailed review of the evidence in a case of this character for the purpose of determining the propriety of the trial court's refusal to direct a verdict would be an idle and useless ceremony in the light of the recent decisions of the Supreme Court. This is so regardless of what we might think of the sufficiency of the evidence in this respect. The fact is, so we think, that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees. (See dissent of Mr. Justice Roberts in *Bailey* v. *Central Vermont Ry.* 319 U. S. 350, 358.)"
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> "Moreover, not only are these issues to be decided by the jury but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict."

The rule that the jury's finding as to negligence and proximate cause is conclusive was concretely applied to the facts of this case even though there was "no proof" (R. 163) of negligence or proximate cause between the claimed negligence and the accident.

A pronouncement by a Court of review that a jury's verdict in a negligence action is conclusive is startling, to say the least and particularly so in a case where the reviewing court acknowledges that there was "no proof" as to negligence or proximate cause. This Court has repeatedly reiterated that "in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding," (*Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524), and that "when the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with applicable practice without submission to the jury, or by judgment notwithstanding the verdict." (*Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479.)

The administration of justice has not reached the point where the failure to prove that an employee's death was caused by his employer's negligence furnishes ample grounds for sustaining a jury finding to the contrary. If absence of either negligence or proximate cause is sufficient to support a judgment, under a statute which makes negligence the basis of liability, then the Constitutional guarantee that no one shall be deprived of property without due process of law is nothing more than an empty phrase. Certainly this Court has not so held, either in the case of *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321

U. S. 29, specifically relied upon by the majority, or in any of the other decisions referred to in the majority opinion.

In all of the recent decisions referred to by the Court of Appeals, it is specifically recognized that there must be proof of negligence before a railroad is liable in actions under the Act, and that whether there is sufficient evidence to warrant the jury's finding of either negligence or proximate cause, is a question subject to review. This Court has never held that a jury's finding on either of these questions is conclusive. In the *Tennant* case, this Court undertook a detailed review of the evidence as to causation between negligence and the injury, and finally concluded that "the ultimate inference that Tennant would not have been killed but for failure to warn him is therefore supportable." (p. 34.) This is an express recognition that there still must be "some proof" of causal connection between negligence and injury. And even in *Lavender* v. *Kurn*, 90 L. Ed. 692 (Adv. Op.), in which the majority of the Court of Appeals characterized the jury's finding as amounting to "nothing more than a guess on its part" (R. 162), this Court specifically said that "only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." (p. 697.) Again this is an express recognition that there must be "some proof" to support the jury's finding and that if there is "no proof" the jury's verdict can be set aside.

If it is true that the law now is that jury verdicts in actions under the Act are unassailable, even though there is "no proof" to sustain them, it should be so specifically stated by this Court, rather than to be so declared by an intermediate court of appeal. Certainly the revolutionary doctrine announced by the majority of the Court of Appeals in this case requires a further review of the judgment by this Court.

B.

The Majority of the Court of Appeals, in Holding That Instructions to the Effect That It Was Petitioner's Duty to Furnish Respondent's Decedent With a Reasonably Safe Place in Which to Work Were Properly Given Under the Facts, Has Misconstrued the Decision of This Court in Bailey v. Central Vermont Railway, 319 U. S. 350.

At Respondent's request, the Court gave two instructions to the jury to the effect that it was Petitioner's duty to furnish Respondent's decedent with a reasonably safe place in which to work (R. 129). The majority of the Court of Appeals held that the giving of these instructions did not constitute error, even though there was no evidence that the premises in question were not reasonably safe or that there was any causal connection between the physical condition of the premises and the accident.

The rule requiring a master to furnish a servant a reasonably safe place to work has reference to the physical condition of the place itself and not to the negligent acts of fellow employees. *Peterson* v. *Oak Park El. R. R. Co.*, 260 Ill. 280, 282; *Keefe* v. *Armour & Co.*, 258 Ill. 28, 34. The majority of the Court of Appeals recognized that many decisions supported petitioner's contention but held they should not be followed because of the decision in *Bailey* v. *Central Vermont Railway*, 319 U. S. 350 (R. 165). We respectfully submit that the Circuit Court of Appeals has misconstrued the decision of this Court in the *Bailey* case. While it is true there was no defect in the premises in the *Bailey* case, still there was a causal connection between the accident and the dangerous condition of the place itself where the plaintiff was required to perform his work.

In the instant case, there was no evidence that the condition of the place where Respondent's decedent was just prior to the time he was killed had any causal connection

whatsoever with his death. Certainly, under the common law, it was never held that an employer breached his duty to furnish an employee a reasonably safe place to work if the employee is injured by the negligent acts or omissions of fellow-employees, by reason of which the place is rendered unsafe or dangerous. This Court has held that where an employee is injured by the negligent act or omission of a fellow employee the master has not breached the duty of furnishing a reasonably safe place to work. (*Martin* v. *Atchison, Topeka & S. F. R. R. Co.*, 166 U. S. 399, 403; *Armour* v. *Hahn*, 111 U. S. 313, 318.)

At the instant of the injury, every place in which an injury is inflicted is unsafe. Even though the jury was of the opinion that Petitioner was not negligent in the manner in which it moved the cars on track 6, it might have based its verdict of guilty on these instructions on the reasoning that, since Griswold was killed, the premises must certainly have been unsafe, or else he never would have been killed. If the jury's finding as to negligence is as conclusive as the majority of the Court of Appeals says it is, the least the railroad is entitled to is instructions applicable to the facts in the case.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

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